In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 936

R. A. BEAVER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is a condemnation proceeding brought to acquire petitioners' interest, if any, in certain land. The tract involved is on the site of property patented in 1914 to petitioners' predecessor in title. The patented land was located on the Arizona side of the Colorado River (Pet. App. 1a, 2a–3a). Between 1922 and 1926, the river eroded the entire tract, washing its soil downstream. While the river was thus shifting (toward Arizona), it carried soil from upstream areas and deposited it on the bank of government-owned, riparian land on the California side (opposite the destroyed patented tract). By 1936, these soil deposits had extended the government's land to the same geographic location as the original tract, the site then

207-848—66

being on the California side because of the shift in the river (Pet. App. 11a). The tract of land created in this fashion was ostensibly privately owned except for a period from 1940 to 1942, when the State of Arizona levied upon it to satisfy unpaid taxes (Pet. App. 4a). Petitioners held record title to the tract at the time condemnation proceedings were instituted in 1960. The district court found that the slow shift in the Colorado River created the land in issue by the process of accretion. It held that the government is, therefore, the owner of tract, and that petitioners have no compensable interest. The court of appeals affirmed (Pet. App. 1a–14a, 25a–32a).

It is beyond cavil that a riparian owner gains title to the increase in his land formed by the "gradual and imperceptible" accretive action of the river.[1] Petitioners do not seriously challenge the factual determination that the government acquired title to the tract in this case under that canon of land law.[2] Con-

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[1] *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 624. See, *e.g.*, *New Orleans* v. *United States*, 10 Pet. 662, 717; *Banks* v. *Ogden*, 2 Wall. 57; *City of St. Louis* v. *Rutz*, 138 U.S. 226; *Nebraska* v. *Iowa*, 143 U.S. 359, 360–361; *Arkansas* v. *Tennessee*, 246 U.S. 158, 173–174; *Oklahoma* v. *Texas*, 265 U.S. 493.

[2] Petitioners suggest (Pet. 15–16) that the exceptional doctrine of re-emergence is applicable here. That claim was fully considered and properly rejected by the court below (see Pet. App. 12a). "Re-emergence" does not permit a former owner to claim land that has arisen on the opposite side of the river thus blocking another owner's riparian rights. Furthermore, the contention (Pet. 16–17) that the Government's construction of the Laguna Dam was a material cause in the erosion of the original tract or the accretion is without support in the record (see Pet. 12a); and assuming that the dam were "a minor factor in producing the accretion" it would not alter "the general rule" (*Oklahoma* v. *Texas*, 265 U.S. 493, 499).

sequently, the concurrent findings of the two courts below, which are at all events amply supported, do not warrant further review. *Comstock* v. *Group of Institutional Investors,* 335 U.S. 211, 214; *Rudolph* v. *United States,* 370 U.S. 269, 271. Petitioners maintain that the government is estopped from asserting its title in view of the time elapsing between the formation of the tract and the filing of this action. But the failure of its agents to enforce ownership cannot forever bar the government.[3] *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 330, 335–336; *Alabama* v. *Texas,* 347 U.S. 272; *Lee Wilson & Co.* v. *United States,* 245 U.S. 24, 31; *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 408–409; *United States* v. *California,* 332 U.S. 19, 39–40. Petitioners reply that, since they had placed improvements on the land and were in actual possession of it (Pet. 10–11), the decisions of this Court do not control. In both the *Utah Power & Light Co.* and the *California* cases, *supra,* similarly situated claimants, with more compelling reasons to rely on the government's inaction, could not prevail over the constitutional power of Congress to dispose of public property and the strong policy in favor of the public right.

[3] This is not a case where, over the course of many years, the government has not objected to the private use of public lands, thereby granting an implied license which permits continued free use "so long as the Government * * * [does] not cancel its tacit consent." *Light* v. *United States,* 220 U.S. 523, 535. See, also, *Buford* v. *Houtz,* 133 U.S. 320, 326; *United States* v. *Grimaud,* 220 U.S. 506, 521. Nor is the government here attempting to recover for petitioners' use of the land during the period of their possession.

243 U.S. at 402–403, 409; 332 U.S. at 22–23, 39. Moreover, petitioners could not have acquired ownership of the land under the Color of Title Act, 43 U.S.C. 1068 *et seq.* (Pet. App. 37a–38a) as they did not comply with the requirement of 20 years' continuous and actual adverse possession (Pet. App. 9a–10a, 28a–29a). The chain of actual possession was broken during the period in which the State of Arizona levied on the land for taxes. In addition, the government-owned land to which the tract was added by accretion had been withdrawn from entry in 1929 (Pet. App. 10a), and hence has not been subject to patent under the Color of Title Act for more than 35 years.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1966.

U.S. GOVERNMENT PRINTING OFFICE:1966